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No. 127

In the

Supreme Court of the United States

OCTOBER TERM, 1968

THE BASSICK COMPANY and
STEWART-WARNER CORPORATION,

Petitioners,

vs.

DAVID R. BLAKE and
EVER-LEVEL GLIDES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1465

THE BASSICK COMPANY and
STEWART-WARNER CORPORATION,

Petitioners,

vs.

DAVID R. BLAKE and
EVER-LEVEL GLIDES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents submit that a writ of certiorari should not be issued for the purpose of reviewing the judgment of the United States Court of Appeals for the Seventh Circuit in its case No. 16213.

REASONS FOR DENYING THE WRIT

I. The Question Presented is One of Fact

It is clear from a consideration of the several restatements of the question presented by petitioners, as set forth on pages 2 and 3 of the Petition, that this Court is

being requested to consider and rule on a question of fact. Each repetitious rephrasing of the question presented by petitioners is conditioned on the alleged fact that Blake did make a misrepresentation regarding a material fact to the Patent Office in order to obtain the retroactive license for foreign filing.

The several restatements of the question presented by petitioners are set forth below with portions in italics to emphasize the essential question of fact on which the Petition is solely based:

> "Where an administrative agency of the United States government has taken the specific action sought in a petition *which contains a misrepresentation regarding a material fact,* is the administrative action valid nonetheless? Or should it be held void *upon proof of the misrepresentation* in a subsequent judicial proceeding?"
>
> "Where a license retroactively authorizing the filing of a foreign patent application has been granted by the Patent Office upon a sworn statement *which contains misrepresentations regarding a fact material to the Office's determination* as to whether the foreign application had been filed 'inadvertently' within the meaning of the applicable statute, is the retroactive license valid even so? Or, *upon proof of the misrepresentation,* should the license have been held void —and the U.S. patent corresponding to the foreign application also held invalid, as issued without the license required by the Patent Act?"

In attempting to frame a legal issue and fabricate grounds on which this Court might favorably consider the Petition, petitioners allege that a fundamental conflict exists between the decisions of the courts below and the statutes in question. The erroneous position taken by petitioners requires overlooking and ignoring that the

courts below both specifically found that no misrepresentations were made to the Patent Office. Under such circumstances there obviously can be no fundamental conflict as alleged by petitioners, as the question as presented is rendered moot in this case because there was no misrepresentation.

Accordingly, this Court's decisions in *Keystone Driller Co.* v. *General Excavator Co.* (1933), 290 U.S. 240, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.* (1944), 322 U.S. 238, *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.* (1945), 324 U.S. 806 and *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.* (1965), 382 U.S. 172, are not applicable in support of petitioners' position. In *Keystone Driller Co., supra,* the question considered by this Court was one of law, namely, the meaning and application of the equitable maxim of unclean hands. No question of fact was in dispute. This Court determined the question of whether the aforementioned maxim should apply in dismissing all causes of action set forth in the complaint, or merely those causes directly connected with the wrongful conduct.

In *Hazel-Atlas, supra,* the facts were not in dispute and the question was whether the federal courts have the power to set aside a judgment because of undisputed evidence of fraud in the procurement of the judgment, even though the term in which such judgment had been entered had expired.

In *Precision Instrument, supra,* the facts were not in dispute. The District Court had dismissed the complaint because of unclean hands and the Court of Appeals had reversed. There was conflict between the two courts on the question of when the maxim of unclean hands should be applied, such question being resolved by this Court.

In *Walker Process, supra,* the question was whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office could be the basis for an action under the Sherman Act. The petitioner therein alleged fraudulent acts in a counterclaim, which counterclaim was dismissed without trial on the merits. As there had been no trial, this Court merely assumed the facts alleged to be true and answered the specific question of law presented. The case was reversed and remanded for trial.

II. The Fact Question was Considered and Resolved by Both the District Court and Court of Appeals

Contrary to conclusions drawn by petitioners, the Court of Appeals very thoroughly reviewed the facts of the case surrounding the alleged misrepresentations, and completely absolved Blake of this charge. The decision of the Court of Appeals as reprinted in the Petition consists of approximately seven printed pages, the dissent being directed solely to the unrelated issue raised on cross-appeal. Of the aforementioned seven pages approximately two pages are devoted exclusively to the charge of misrepresentation. Accordingly, it cannot be said that this issue was inadequately considered below, particularly in view of the fact that it was the primary issue raised by petitioners in support of their contention that the Blake patent was invalid.

While lengthy consideration of a particular issue is no substitute for quality of content and resolution, it is apparent that the Court of Appeals fully reviewed all of the evidence presented by petitioners during the trial and concluded that there was no reason to upset the District Court's conclusion that the retroactive license was valid. Thus, the Court of Appeals fully affirmed the findings of

the District Court and thoroughly disagreed with petitioners that alleged misrepresentations had been made by Blake.

As in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.* (1949), 336 U.S. 271, this Court has repeatedly held that its function is not to correct errors in fact finding in the absence of a very obvious and exceptional showing of error. Furthermore, this Court cannot review concurring findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. Certainly petitioners have not presented a question to this Court involving a very obvious and exceptional showing of error.

Accordingly, it is respectfully requested that this Petition be denied.

Respectfully submitted,

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